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Workmen's Compensation

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In this article the author discusses recent developments in workmen's compensation law. Topics include the payment of attorney's fees, the right to compensation benefits and new changes in the workmen's compensation rules of procedure.

I. INTRODUCTION

Updating the area of the workmen's compensation law can best be achieved by discussing the predominant areas of recent attention. It is to be noted that in recent years significant decisional law has emanated from the Industrial Relations Commission.[1] This results from the enhanced judicial decisionmaking procedures of that forum. The Supreme Court of Florida, in *Scholastic Systems, Inc.*

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1. Written decisions of the Industrial Relations Commission are reprinted and distributed by that body through a decisional law service. The suffix (S) involving an Industrial Relations Commission decision stands for "Survived" reflecting the fact that neither party sought review by the Supreme Court of Florida or agreed to dismissal of any proceedings sought. Where no supreme court proceedings have taken place and the suffix (S) is absent, the case reported may still be pending for review in the supreme court. Selected decisions of the Industrial Relations Commission and its predecessor are also reported in Florida Compensation Reports.

v. LeLoup, has recognized this and thus defers to Industrial Relations Commission decisions:

> IRC cases shall thereafter be reviewed by this Court upon traditional certiorari grounds based upon a departure from the essential requirements of law, rather than upon general appellate considerations. Appellate review shall be solely for the IRC, with review only in the Florida Supreme Court upon traditional certiorari grounds upon a failure to conform to the essential requirements of law below.[2]

It is unclear what legal effect *Scholastic Systems, Inc.* will have except that the decision provides a vehicle for justifying the granting or denying certiorari depending upon the court's desire to make a pronouncement in a particular case. Certiorari has always been granted or denied on the grounds that the decision below did not conform to the essential requirements of law. However, neither *Scholastic Systems, Inc.* nor any subsequent decisions have announced any specific definition of the essential requirements of law.

Accordingly, there appears to be no legal change limiting the jurisdiction of the court, although there unquestionably was an announced philosophical change in that the court intended to limit the scope of review in workmen's compensation cases.

Thus, there appears to be no definable legal standard regarding involvement by the court. Accordingly, the primary decisional law is left to determination by the Industrial Relations Commission. The Supreme Court of Florida shall become involved only where the court deems it appropriate to apply its sense of "law" or "justice" to the determination in any particular case. It is, therefore, appropriate that the primary decisional law discussed is that of the Industrial Relations Commission.

II. ATTORNEY'S FEES

Questions concerning attorney's fees in workmen's compensation cases basically revolve around issues as to (1) entitlement; (2) amount; (3) findings and sufficiency of the evidence; and (4) benefits considered. As a general observation, it seems apparent that decisional law is formulating more realistic guidelines regarding the issue of entitlement by liberally construing the concept of benefits.

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2. Scholastic Systems, Inc. v. LeLoup, 307 So. 2d 166, 173 (Fla. 1974). *See* Vargas v. Americana of Bal Harbour, 345 So. 2d 1052 (Fla. 1977) wherein the court held that an evaluation as to the extent of the sufficiency of fact finding by the trial judge is better left to the decision of the Industrial Relations Commission even though the result reached by the trial judge may be supported by competent substantial evidence.

Correspondingly, there now seems to be closer scrutiny of the amount, the sufficiency of evidence and findings in connection therewith, and the action of counsel in actually precipitating payment.

A. *Entitlement*

Under the applicable statute, attorney's fees are due if: (1) the employer or carrier files notice of controversy as provided in section 440.20 of the Florida Statutes (1977), or (2) declines to pay a claim on or before the twenty-first day after they have notice of it, or (3) otherwise resists unsuccessfully the payment of compensation.[3] The first category is rare and, until recent decisions, the last category had not been utilized. The result was an almost exclusive use of the second category which led to an unfortunate rigidity, since in determining entitlement, the twenty-one day limit has been strictly applied. Recent decisional law seems to be effectuating the purposes of the attorney's fee section more realistically through increased reliance upon the third category and a reevaluation of the application of the second category.

Thus, an attorney's fee was held due where, for a period of over one year, the employer insisted that the claimant's disability was personal rather than industrial even though the claim was paid within twenty-one days of its filing.[4] Without articulating the specific statutory basis therefor, it was held that an award of an attorney's fee was appropriate.[5] Because the benefits were paid within twenty-one days of the filing of the claim, the second above-noted category, under established law, would not have been the appropriate basis for awarding attorney's fees.[6] The opinion apparently rested upon the nonarticulated statutory basis of otherwise unsuccessfully resisting the payment of compensation (since the claimant was forced to seek an attorney due to the employer's insistence that the claim was personal). This statutory basis for awarding attorney's fees was specifically articulated in a later case where the carrier advised the claimant that benefits were being suspended, but within twenty-one days of the filing of a claim, the carrier reversed

3. FLA. STAT. § 440.34 (1977).

4. Pan American World Airways, Inc. v. Dorminey, I.R.C. Order 2-2988 (Fla. Indus. Rel. Comm'n June 30, 1976), *cert. dismissed*, 348 So. 2d 951 (Fla. 1977).

5. *Id.* at 5.

6. *See* Carillon Hotel v. Rodriguez, 124 So. 2d 3 (Fla. 1960). The court therein construed the 21-day period as commencing with the actual filing of the claim, not merely when notice of it was given.

itself and resumed payments.[7] The advice that benefits were being suspended was held to fall within the category of otherwise unsuccessfully resisting the payment of compensation thereafter agreed to be due.[8]

Along with the newly applied third category, there has been new scrutiny of the second category. The prelude to these recent decisions was the case of *Lehigh Portland Cement Co. v. Branch,*[9] where it was held that no attorney's fee was due when the claimant's physician delayed one and one-half months in reporting claimant's disability to the carrier, which upon receipt of the report, accepted liability for payment of benefits even though payment did not occur within twenty-one days of the physician's examination.[10] After *Branch,* a number of decisions have held that the carrier has twenty-one days from notice of permanent partial disability or permanent total disability in which to accept liability for payment of benefits.[11] The decisions, on their face, seem to relieve the employer-carrier from the duty to investigate promptly and to pay appropriate benefits. However, it is unclear from the reported facts the extent to which, if at all, these decisions directly overrule previous pronouncements which had placed such a duty on the employer-carrier. The result may be dependent upon the action or inaction of counsel

7. Florida Dep't of Commerce v. Fields, I.R.C. Order 2-3140 (Fla. Indus. Rel. Comm'n Apr. 21, 1977)(S).

8. *Id.* at 4.

9. 319 So. 2d 13 (Fla. 1975).

10. *Id.* at 14; *cf.* Davis v. Edwin M. Green, Inc., 240 So. 2d 4 (Fla. 1970) (attorney's fees awarded even though partial payment within 21 days). In *Davis,* the carrier was paying benefits for 23% permanent disability of one eye, whereas claimant contended he was entitled to benefits for a total loss of vision. Claimant's counsel arranged for two hearings which were postponed by the employer. A few days before the third scheduled hearing, claimant's counsel deposed the employer's physician who confirmed that the loss of vision was total. Benefits for a total loss were accepted the following day with the employer contending no fee was due. Obviously, claimant's counsel in the context of that case was instrumental in breaching what the court termed the "wall of the willful ignorance." The court noted, "[t]he Florida Workmen's Compensation Law does not contemplate that an employer may insulate itself from knowledge that benefits may be due to a claimant and then, when its wall of willful ignorance is breached by claimant's attorney, commence 'voluntary' payments and resist payment of attorneys' fees." 240 So. 2d at 5. Of note is the short period of time which elapsed in the *Branch* case and the fact that the carrier there was not charged with knowledge that some investigation was necessary. *But see* Spencer v. Eastern Airlines, Inc. 3 F.C.R. 112 (Fla. Indus. Rel. Comm'n 1958) wherein five months had elapsed and the employer-carrier was charged with responsibility for investigating claimant's permanent disability.

11. Jones Miami Beach Express v. Mula, I.R.C. Order 2-3245 (Fla. Indus. Rel. Comm'n Oct. 3, 1977); Central Heating & Air Cond. v. Harrison, I.R.C. Order 2-3242 (Fla. Indus. Rel. Comm'n Sept. 30, 1977)(S); Nick Bruno Transp. & Brokers, Inc. v. White, I.R.C. Order 2-3202 (Fla. Indus. Rel. Comm'n July 22, 1977), *cert. denied,* 358 So. 2d 135 (Fla. 1978); W.L. Sherrod Lumber Co. v. Hall, I.R.C. Order 2-3201 (Fla. Indus. Rel. Comm'n July 21, 1977), *cert. dismissed,* 345 So. 2d 981 (Fla. 1977).

for claimant.[12] Also, the extent to which the carrier is viewed as promptly investigating and paying under one classification of disability may depend upon whether benefits are being provided in good faith under an erroneous classification. Consistent with the purposes of the workmen's compensation law, a somewhat lesser burden to investigate and promptly pay could be imposed in a situation where benefits are being provided, but under the wrong classification.

B. *Amount*

Guidelines regarding the amount of an attorney's fee were codified by the 1977 Florida Legislature.[13] The recommended amounts are twenty-five percent of the first $5,000 of benefits obtained, twenty percent of the next $5,000 of benefits and fifteen percent of the remaining amount. It is further provided that the trial judge may increase or decrease the fee awarded upon consideration of enumerated factors. These are the same factors set forth in the Canons of Ethics[14] for determining the amount of a reasonable attorney's fee.

The trial judge has a reasonable amount of discretion in determining a reasonable attorney's fee in any particular case. However, it is apparent from the decisions that high attorney's fees are now closely scrutinized and a finding that the fee granted is reasonable may depend upon the adequacy of the evidence and findings by the judge.

In the recent leading decision of *Burk Construction Corp. v. Terrible,*[15] the Industrial Relations Commission reversed the award of a $25,000 attorney's fee. The award was in accordance with the only evidence presented, which was testimony of an expert witness offered by the claimant. Though the order did not set forth any evidentiary basis which justified the amount of the fee, it summarily required the employer-carrier to pay an attorney's fee in the amount of $25,000. The Industrial Relations Commission noted that the employer-carrier comes before a reviewing tribunal in a poor posture to attack the award where no controverting evidence has been pre-

12. Fields v. Cooper, I.R.C. Order 2-3198 (Fla. Indus. Rel. Comm'n July 18, 1977)(S).

13. FLA. STAT. § 440.34 (1977).

14. ABA CANONS OF PROFESSIONAL ETHICS, No. 2.

15. I.R.C. Order 2-2863 (Fla. Indus. Rel. Comm'n Oct. 30, 1975). After remand, an order subsequently awarded $24,000 in attorney's fees. Upon review the Industrial Relations Commission said that, considering the amount of time invested in the case, the award shocked the conscience. Burk Constr. Corp. v. Terrible, I.R.C. Order 2-3132 (Fla. Indus. Rel. Comm'n Apr. 4, 1977), *cert. denied,* 353 So. 2d 680 (Fla. 1977).

sented. It was pointed out, however, that the amount of attorney's fees awarded must still be reasonable in light of the record as a whole and also in conformity with the evidence. It was thus held that the amount was excessive based on the whole record, not just the testimony offered, and the cause was remanded for redetermination.[16]

Traditionally, determination as to the amount of a reasonable attorney's fee had invariably been the function solely of the trial judge, with the determination being based upon the evidence and the judge's discretion while looking at the record as a whole. The judge's determination was then subject to review by an appellate tribunal. In a unique decision, however, the Industrial Relations Commission in *Somerset Construction v. Valdes*[17] held a fee of $23,000 excessive and then proceeded to set the fee itself. It was held that $12,500 "would be fair and reasonable compensation to counsel for claimant."[18]

This decision raises a question as to the standard employed on review by the Industrial Relations Commission in setting attorney's fees. Will it be: (1) set in accordance with the highest reasonable amount not shocking to the judicial conscience; or (2) set de novo in accordance with the reviewing tribunal's view as to a reasonable fee? It appears the latter process took place in *Valdes,* but it is suggested that where the reviewing tribunal is to become involved in actually establishing the amount of a fee, the former process is appropriate. Where a reduction is found appropriate on the grounds that the amount shocks the judicial conscience, the amount should be reduced to the highest amount that does not shock the reviewing tribunal's conscience.

In determining a reasonable attorney's fee, the amount of time spent on the case has repeatedly been held to be a significant factor. How must time is too much for a good lawyer? How should a novice be compensated when he spends a considerable amount of time because of his lack of skill? What, if anything, should be done when a client requires "above-average" time in communicating with the lawyer about the case? In *Valdes,* it was noted that the time factor was inordinately high because the claimant demanded more attention than the average client and his first counsel was a neophyte.[19] It was held that the parties should not be required to pay for the

16. I.R.C. Order 2-2863 at 11.

17. I.R.C. Order 2-2989 (Fla. Indus. Rel. Comm'n June 30, 1976), *cert. denied,* 345 So. 2d 428 (Fla. 1977).

18. *Id.* at 5.

19. *Id.* at 4.

basic educational process of counsel.

The decision was a precursor to the later decision of *Kelly Tractor Co. v. Jarrell,*[20] affectionately referred to by practitioners as the "hand-holding" decision. In *Kelly,* it was recognized that an attorney's responsibility includes advising and counselling his client, but that the employer-carrier should not be penalized in those cases in which claimant is a "worrier" who needs constant reassurance and "hand-holding." It was held that excessive hours spent "hand-holding" should be discounted when considering the award of reasonable attorney's fees.[21] It is apparent from these decisions that the present emphasis on the benefits achieved is no real talisman in determining reasonable attorney's fees.

What are the relative grades of inexperience, and what is a reasonable hourly rate? What is a reasonable number of hours in any particular case, and what amount of time spent with a client is "average"? What is a reasonable attorney's fee for the exceptionally skilled expert who, with little effort, achieves great success, as compared to the average practitioner who with many times the number of hours obtains a lesser degree of success? *R.H. Coody & Associates, Inc. v. Shelton*[22] held that the award of an attorney's fee to a skilled practitioner who obtained an excellent result with approximately forty hours of work was per se excessive where the fee came out to $325 per hour.

C. *Sufficiency of Findings and Evidence*

The previous, sometimes cavalier approach to the attorney's fee issue has, in accordance with recent decisional law, gone by the wayside. Where the issue is determined by the trial judge, practitioners must present the proper predicating evidence. In addition, the trial judge must make necessary findings which substantiate the ultimate determination.

Thus, where parties have agreed to handle presentation of expert opinions concerning a reasonable attorney's fee through affidavits, they must be careful that the affidavits are filed with requests that they be placed into evidence; that the affidavits are certified as being served on opposing counsel; and that the affidavits are actually placed in evidence.[23] Even where this procedure is followed,

20. I.R.C. Order 2-3018 (Fla. Indus. Rel. Comm'n Aug. 19, 1976), *cert. denied,* 348 So. 2d 949 (Fla. 1977).

21. *Id.* at 5.

22. 352 So. 2d 852 (Fla. 1977).

23. R&K Constr. Co. v. Golden, I.R.C. Order 2-2931 (Fla. Indus. Rel. Comm'n Mar. 5, 1976)(S).

parties should still reserve the right to challenge the affidavits. Where this was not done, it was nevertheless held that the trial judge, upon receipt of affidavits which were admitted into evidence, must notify opposing counsel as to their receipt, their admission into evidence and afford counsel the opportunity to thereafter challenge the affidavits.[24]

A significant factor in the determination as to the amount of an attorney's fee is the time involved. Where the time is specified by affidavit, counsel must be sure officially to offer and to admit the affidavit into evidence, or a significant factor predicating the award of attorney's fees is absent, and the award of a fee may not be sustained.[25] In addition, the services involved should be reasonably identified or the particular award may not be sustained.[26]

It is incumbent upon the trial judge, particularly where a substantial fee is awarded, to make adequate findings referring to which factors were considered and the significance of each in reaching the particular determination. The findings should track the reasoning which led to the ultimate determination.[27] Even though the determination may be supported by competent, substantial evidence, if the Industrial Relations Commission is not satisfied with the extent of the findings and reasoning, the cause can be remanded for a redetermination.[28]

It is apparent from recent decisional law that the presentation of evidence in connection with attorney's fees requires a degree of care similar to that exercised in connection with the presentation of the case on merits. In addition, a substantial attorney's fee requires a degree of findings which now seems to exceed the degree of findings necessary in connection with other issues.

D. *Benefits Considered*

An individual who is found permanently and totally disabled is entitled to supplemental benefits amounting to an additional increment of five percent per year.[29] These benefits are paid by the

24. Rowe & Mitchell v. Rodgers, I.R.C. Order 2-3091 (Fla. Indus. Rel. Comm'n Jan. 11, 1977), *cert. denied*, 348 So. 2d 952 (Fla. 1977).

25. BCC Brevard v. Pickleseimer, I.R.C. Order 2-3098 (Fla. Indus. Rel. Comm'n Jan. 27, 1977)(S).

26. Volpe v. Sirozotti & Natale Nobili Constr. Co., I.R.C. Order 2-3171 (Fla. Indus. Rel. Comm'n May 31, 1977)(S); McDonough Constr. Co. v. Cavender, I.R.C. Order 2-2921 (Fla. Indus. Rel. Comm'n Feb. 6, 1976)(S) (fee reversed where there was no showing of time and effort).

27. Volpe v. Sirozotti & Natale Nobili Constr. Co., I.R.C. Order 2-3171 (Fla. Indus. Rel. Comm'n May 31, 1977)(S); McDonald's Drive-In v. Shrewsberry, I.R.C. Order 2-3144 (Fla. Indus. Rel. Comm'n Apr. 22, 1977)(S).

28. Vargas v. Americana of Bal Harbour, 345 So. 2d 1052 (Fla. 1977).

29. FLA. STAT. § 440.15(1)(e) (1977).

Workmen's Compensation Administrative Trust Fund and not by the particular or his insurance carrier. Rather, they are obtained on behalf of the claimant and may represent very substantial amounts.

In *City of St. Cloud v. Maloy*,[30] the issue was presented as to whether the award of an attorney's fee should contemplate consideration of permanent total disability benefits obtained through the efforts of claimant's counsel, but which benefits were not paid by the particular employer-carrier. The trial judge excluded those benefits from consideration. The Industrial Relations Commission reversed, and the majority opinion stated: "Such benefits clearly would not have accrued to the employee but for the efforts of counsel resulting in an award of permanent and total disability compensation."[31] The dissenting opinion acknowledged that to be the case but approached the issue by emphasizing the fact that the employer-carrier did not make those payments nor were those supplemental benefits specifically awarded by the trial judge.[32] The reasoning of both opinions seems correct, with the majority opinion perhaps representing a sounder determination of an admittedly difficult question. The benefits are, in fact, indirectly paid by the general community of employers through an additional levy, and the benefits are intended to flow automatically upon declaration of claimant's disability. These facts would seem to favor the result reached by the majority. As an aside, the Industrial Relations Commission has held that there is no authority for the assessment of an award for attorney's fees against the Workmen's Compensation Administrative Trust Fund.[33]

In the recent case of *Ohio Casualty Group v. Parrish*,[34] a reasonable attorney's fee was held to be due because of the review of an equitable distribution order sought by the employer-carrier in connection with its claim of lien in a third-party case. The court stated: "The conduct of the petitioner [carrier] in the instant cause falls squarely within both the policy considerations of Section 440.34(1), Florida Statutes (1975), calling upon it to pay respondents' attorney's fees and the expressed language of that statutory

30. I.R.C. Order 2-2935 (Fla. Indus. Rel. Comm'n Mar. 12, 1976), *cert. denied*, 348 So. 2d 945 (Fla. 1977).

31. *Id.* at 2.

32. *Id.* at 4.

33. Florida Dep't of Commerce v. Taylor, I.R.C. Order 2-3189 (Fla. Indus. Rel. Comm'n July 6, 1977); Florida Dep't of Commerce v. Fields, I.R.C. Order 2-3140 (Fla. Indus. Rel. Comm'n Apr. 21, 1977)(S).

34. 350 So. 2d 466 (Fla. 1977).

provision."[35] The result is clearly in accordance with the spirit and philosophy of the attorney's fee section, but does not "clearly" fall within the expressed language. The expressed language requires payment of reasonable attorney's fees in connection with resistance or failure to pay compensation benefits.[36] In *Parrish,* the resistance was not to payment of compensation benefits (which had already been paid), the resistance was to accepting a lesser share of the "third-party pie" than that awarded by the trial court. Were the determination to the contrary, however, it could undermine the employee's resistance to the demands of the carrier for the proceeds of a third-party case, because then the employee would be required to pay any additional attorney's fees in order to resist those unjustified demands.

III. ARISING OUT OF AND IN THE COURSE OF EMPLOYMENT

The legal conclusion that a claim or injury did or did not "arise out of and in the course of employment"[37] is often utilized without specifically expressing the exact reasoning for the conclusion. Recent decisions in this area seem to fall within one of three categories: (1) deviation cases; (2) volunteer cases; and (3) work causal relation cases.

In the first category, decisions frequently hold that an employee is not entitled to benefits on the ground of a deviation from employment. Unfortunately, the decisions are not precise in articulating the various kinds of deviations or the grounds for holding that a particular claim does not arise out of and in the course of employment. The result is that the concept of a deviation is often used merely as a legal label justifying a further categorization that the claim does not arise out of and in the course of employment.

An example of a "time" deviation occurred when an employee decided, for personal reasons, to remain on his employer's premises well after his work had been completed. It was held that a reasonable time had expired for the claimant-employee to leave the premises and that an injury, suffered many hours after quitting time, did not "arise out of and in the course of employment."[38] Another example of "time" deviation was where an employee, while geographically within the locus of his employment, tripped on his way home after a personal late night spree and was injured. The claim was

35. *Id.* at 470.

36. FLA. STAT. § 440.34(1) (1977).

37. *See id.* § 440.02(6).

38. Tides Hotel & Bath Club v. Graff, I.R.C. Order 2847 (Fla. Indus. Rel. Comm'n Sept. 29, 1975)(S).

denied on the grounds that the injury did not arise out of and in the course of his employment.[39]

A deviation is often thought of as a geographical departure from a work mission for personal reasons. In *Rex Transmissions, Inc. v. Weintraub,*[40] a "personal" deviation occurred when a claimant-employee, while on a work task, drove through a radar net and fled from the scene. When the claimant was finally apprehended, he was far afield of his original destination and purpose. An award of benefits was reversed on the grounds that there had been a substantial personal deviation. On the other hand, changing lanes to stop and pick up a hitchhiker was held not the kind of "personal" deviation contemplated as exculpating the employer-carrier from responsibility for benefits.[41] Accordingly, benefits in that situation were found due on the grounds that there was no deviation of a substantial nature.

Although never so articulated, negligence concepts have often been applied to what, for want of better terminology, can be referred to as the "task" deviation cases. Generally, workmen's compensation benefits are granted without consideration of fault, unless there are specific statutory defenses such as willful intent to injure oneself or intoxication. Nevertheless, the concepts of fault and contributory negligence have filtered into the workmen's compensation law under the label of a "deviation," as a basis for denying entitlement to benefits.

In the unreported decision in *Yanez v. Premix-Marbletrite Co.,*[42] the claimant-employee threw a fake snake at a co-employee. The latter jumped from the vehicle he was operating and the unattended vehicle ran over claimant-employee, seriously injuring him. There was no question that claimant-employee was at fault and that his action significantly contributed to his injury. It was held he should not recover benefits on the ground that he deviated from his employment. Accordingly, the injury did not arise out of and in the course of employment.

A more passive, yet not faultless, situation occurred in the case of *E.M. Watkins & Co. v. Bouie.*[43] The employee therein went into

39. Demarest v. Jackson, I.R.C. Order 2-3107 (Fla. Indus. Rel. Comm'n Feb. 3, 1977), *cert. denied,* 353 So. 2d 674 (Fla. 1977).

40. I.R.C. Order 2-3238 (Fla. Indus. Rel. Comm'n Sept. 28, 1977)(S).

41. Florsheim Shoe Co. v. Asberry, I.R.C. Order 2-3234 (Fla. Indus. Rel. Comm'n Sept. 22, 1977)(S).

42. Form affirmances by the Industrial Relations Commission are not assigned a decision number. This decision can best be identified as claim no. 266-17-6162 (Fla. Indus. Rel. Comm'n May 14, 1976), *cert. denied,* 344 So. 2d 328 (Fla. 1977).

43. I.R.C. Order 2-3008 (Fla. Indus. Rel. Comm'n July 29, 1976), *cert. denied,* 344 So. 2d 323 (Fla. 1977).

a restricted area of the premises in order to sleep and was subsequently electrocuted. Benefits were denied on the ground that the employee deviated from her employment. On the other hand, no deviation was found where a seemingly diligent employee, without any instructions, though absent any notion of fault, took a typewriter home to do some work and was injured in connection therewith.[44]

The second category of cases which may not arise out of and in the course of employment are the "volunteer" cases. In this category, an employee who was asked to pick up his supervisor and was injured while doing so, was held to be undertaking a personal task and accordingly not entitled to workmen's compensation benefits.[45] Where a teacher, however, not under contract, was injured while attending a class required as a prerequisite to rehiring, the injury was held compensable.[46]

Recent decisional law indicates that teachers may hold a favored position in workmen's compensation law. In *Schisel v. Levy County School Board*,[47] a faculty member was injured while participating in a faculty game held in connection with a senior prom. The accident was held to be compensable. This same disposition, however, does not extend to all public employees. A policeman who was injured at a party at the police chief's house was held not entitled to benefits on the rationale that attendance was solely a voluntary task.[48]

Dade County Board of County Commissioners v. Picherello,[49] involved a Dade County police officer who was required to carry firearms at all times by Dade County regulations. The officer was at the Broward County Airport and was injured when he came to the assistance of Broward police authorities who were apprehending a suspect. The majority opinion held that the injury did not arise out of and in the course of claimant's employment with Dade County, but that there was an implied contract with Broward County pursuant to which workmen's compensation benefits would be obtained. Notwithstanding language to the contrary, the decision

44. Acousti Eng'r Co. v. Bailey, I.R.C. Order 2-3224 (Fla. Indus. Rel. Comm'n Sept 6, 1977), *cert. denied*, ___ So. 2d ___ (Fla. 1978).

45. Federated Dep't Stores, Inc. v. Makepeace, I.R.C. Order 2-2858 (Fla. Indus. Rel. Comm'n Oct. 10, 1975)(S).

46. Williams v. Lumpkin, I.R.C. Order 2-3009 (Fla. Indus. Rel. Comm'n July 29, 1976), *cert. denied*, 345 So. 2d 429 (Fla. 1977).

47. I.R.C. Order 2-3056 (Fla. Indus. Rel. Comm'n Oct. 29, 1976)(S).

48. City of South Daytona v. Mathias, I.R.C. Order 2-2983 (Fla. Indus. Rel. Comm'n June 16, 1976), *cert. denied*, 350 So. 2d 458 (Fla. 1977).

49. I.R.C. Order 2-3163 (Fla. Indus. Rel. Comm'n May 20, 1977).

may well have rested upon the determination of the primarily responsible party. Absent an appropriate responsible party, it could well have been held to be an injury arising out of and in the course of claimant's employment with Dade County. In a well-reasoned concurring opinion, Commissioner Canaday noted: "For the employer to require or even encourage the activity which led to the injury and then deny after the injury that the activity was within the scope of employment is not only legally insupportable but is inequitable as well."[50]

The employer should not be permitted to have it both ways. Undoubtedly, the employer can limit the geographical or other boundaries of employment, but the explicit or implicit responsibilities of the employment should then be so limited. Thus, it is inconsistent to require a police officer to carry a firearm at all times, with the obvious purpose being the possible use of it in appropriate situations, and yet deny coverage when he complies with that purpose.

It is also inconsistent to grant benefits to a teacher who participates in a faculty game while denying benefits to a police officer who attends a party with co-employees at the police chief's home. Employment realities often allow no valid distinction between voluntary or required activities. An employee seeking to enhance or even to retain his employment would be ill-advised to disregard what the law may view as "invitations" from superiors. This category of "volunteer" cases is rife with inconsistencies. Hopefully, future decisions will establish some workable principles.

The final category of course of employment decisions encompasses the work-cause-related cases. A recent leading case is *Southern Bell Telephone & Telegraph Co. v. McCook*,[51] where an employee was on a toilet in the bathroom during a regular break, and when she bent over for some toilet tissue she felt a pain in her back. She was subsequently diagnosed as having suffered a herniated intervertebral disc. The court seemed to question, but ultimately accepted, the fact that the claimant satisfied the prerequisites of an industrial "accident" and that it occurred "in the course of" employment; injuries occurring during a break necessitated by normal bodily functions have long been held compensable. The court, however, held that this injury did not "arise out of" the employment: "There was no causal connection whatsoever between the employment and the aggravation. She simply made a normal movement which, due solely to her idiopathic [preexisting] condi-

50. *Id.* at 14.
51. 355 So. 2d 1166 (Fla. 1977).

tion, produced disability."[52] What would be the result if the employee, while at her work station, had bent over to pick up some papers? The court's rationale and language would seem to indicate that in such a situation the injury would still be noncompensable. This unusual case, however, presented "weak" fact situation (that the injury occurred during a break coupled with the nature of the activity) and a questionable causal relationship (the preexisting physical condition of the claimant), all of which appears to have contributed to the holding of noncompensability.

Analysis of the legal vehicle selected as the basis for denying benefits—doing a normal activity—is clearly unsound. Synthesis of this decision with previous decisions leaves the law in such a state that injuries resulting from certain normal movements, such as bending to pick up toilet paper from the floor, are noncompensable, whereas injuries resulting from other normal movements, for example readjusting a girdle, can result in compensation recovery.[53]

IV. Medical Care

The employer-carrier is required to "furnish to the employee such remedial treatment, care, and attendance . . . as the nature of the injury or the process of recovery may require, including medicines, crutches, artificial members, and other apparatus."[54]

A. *Medical Treatment*

The primary issues that arise concerning medical treatment involve the respective obligations of the parties where a change of physician or additional medical care is sought. Recent decisions in this area have clarified each party's respective responsibility.

Where a particular physician has been authorized to treat the employee and the employee requests a change of physician, "it is then incumbent upon the employer to provide another physician, or obtain a ruling from the Judge of Industrial Claims that the change was not for the best interest of the claimant."[55] Absent an employer's authorization of other medical care, the claimant may seek such care and assert the responsibility of the employer-carrier by showing that the care was reasonable and necessary. This naturally

52. *Id.* at 1169.

53. *See* Jernigan's Studio v. Hopewell, 7 F.C.R. 38 (Fla. Indus. Rel. Comm'n 1972)(S) (compensable injury occurred when claimant pulled up her girdle in the bathroom and felt a sudden pain in her back).

54. Fla. Stat. § 440.13(1) (1977).

55. Florida Power & Light Co. v. Enos, I.R.C. Order 2-3045 (Fla. Indus. Rel. Comm'n Oct. 12, 1976)(S).

assumes compliance with the requirement regarding filing of requisite medical reports within ten days of first treatment.[56] Where the employer does provide the claimant with another physician or physicians, it is then incumbent upon the claimant to proceed before the judge of industrial claims seeking authorization for the particular physician or physicians.[57]

Generally, a failure by the employer-carrier to provide claimant with medical care (including a change of physician) opens the door for the employee to obtain treatment at the expense of the employer. This employer liability, however, is apparently qualified as a practical matter by considerations of cost and geographical area. Where an expensive or an unusual type of care is being sought, unless it is an absolute emergency,[58] the employee must seek the prior approval of a judge of industrial claims even where the requested care has been denied.[59]

Where a physician has been authorized by either the employer or carrier, the issue often arises as to the ability of the employer-carrier to unilaterally seek a change of physician. Where there has been an initial authorization by the employer, responsibility lies with him for payment of the physician's bill until such authorization is revoked and other suitable medical care is afforded to the claimant.[60] If a physician has been authorized and the care is acceptable to the claimant, and change in treatment should be authorized by a judge in order to assure that the change is in the best interest of all concerned. The relationship of the attending physician and the claimant should not be interrupted at whim, nor

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56. [N]or shall any claim for medical, surgical, or other remedial treatment be valid and enforceable unless within 10 days following the first treatment (except in cases where first-aid only is rendered), and thereafter at such intervals as the division by regulation may prescribe, the physician or other recognized practitioner giving such treatment or treatments furnishes to the division and to employer, or to the carrier if the employer is not self-insured, a report of such injury and treatment on forms prescribed by the division, provided that a judge of industrial claims for good cause may excuse the failure of the physician or other recognized practitioner to furnish any report within the period prescribed and may order the payment to such employee of such remuneration for treatment or service rendered as the judge of industrial claims finds equitable.

FLA. STAT. § 440.13 (1977).

57. *See* First of Hialeah Bldg. v. Evans, I.R.C. Order 2-3134 (Fla. Indus. Rel. Comm'n Apr. 12, 1977)(S); Florida Power & Light Co. v. Enos, I.R.C. Order 2-3045 (Fla. Indus. Rel. Comm'n Oct. 12, 1976)(S).

58. Food Fair Stores v. Hessler, I.R.C. Order 2-3159 (Fla. Indus. Rel. Comm'n May 18, 1977)(S).

59. Moomaw v. H-Y Fabricators, I.R.C. Order 2-3236 (Fla. Indus. Rel. Comm'n Sept. 22, 1977).

60. Zins v. Saxony Hotel, I.R.C. Order 2-2979 (Fla. Indus. Rel. Comm'n June 11, 1976), *remanded on other grounds,* 343 So. 2d 838 (Fla. 1977).

should the law encourage shopping for medical treatment more satisfactory to the employer-carrier.

B. *Nursing Care*

Recent decisions reiterate the established rule[61] that the services of a member of the immediate family are presumptively gratuitous. Generally, the decisions involve services of a wife to her injured spouse, with the issue being whether the extent of the services are sufficient to qualify as nursing-attendance care.

Solomon Construction Co. v. Jackson[62] involved services of a wife to her blinded husband: administering insulin shots and watching for a reaction; giving pills for hypertension; and transporting him. The award to the wife, compensating her for fourteen hours per week at two dollars per hour, was reversed on the grounds that the services were not such as to overcome the presumption of gratuitousness. Similarly, in *Florida Department of Transportation v. Cato*,[63] an award to the wife was reversed on the grounds that services were not such as to overcome the presumption of gratuitousness. The case involved a sixty year old male with a serious leg fracture and a loss of balance due to inner ear injury. The attending physician felt attendance care was necessary: (1) to prevent claimant from hurting himself; (2) to provide him with medication; and (3) to take care of his basic needs such as using the bathroom. The trial judge determined the need for attendance care based upon testimony of the attending physician and the obvious realities of life.[64] With impaired balance and a serious leg fracture, the claimant obviously needed assistance just to carry out customary bodily functions and medically necessary hygiene. The required continual attendance is not in the same category as the attendance necessary to give an insulin shot or to give a pill for hypertension. The required attendance signifiantly affected the ability of the wife to work and significantly affected her prior life style. On appeal, it was held that claimant did not show a sufficient need for attendance care after he was released from the hospital.[65] The holding considerably narrows the area of compensable care.

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61. *See, e.g.*, Green v. Maule Indus., Inc., 2 F.C.R. 142 (Fla. Indus. Rel. Comm'n 1956).

62. I.R.C. Order 2-2998 (Fla. Indus. Rel. Comm'n July 21, 1976), *cert. denied*, 342 So. 2d 1102 (Fla. 1976).

63. I.R.C. Order 2-3138 (Fla. Indus. Rel. Comm'n Apr. 14, 1977), *cert. denied*, 351 So. 2d 405 (Fla. 1977).

64. *Id.* at 4-5.

65. *Id.* at 6.

Determination of the need for care in this area should not hinge on the loving nature of the spouse. Rather, the determination of entitlement (as opposed to the amount of compensation) should be the same whether or not the claimant is married or has a family; the presence and lovingness of a spouse, however, may well be a basis for a lesser rate of compensation. Where injury has occurred necessitating additional care, compensability should not be determined solely upon the presence or absence of loved ones.

Where nursing care is found to be necessary, no penalties on past due nursing are appropriate.[66] Also, where the need for nursing or attendance care flows from both occupational and nonoccupational injuries, only the care in connection with the occupational injury may be compensated.[67] Where nursing or attendance care is due, payments should be made directly to the attendant.[68]

C. *Other Medical and Medically Related Benefits*

Where it is necessary to treat a preexisting condition in order to treat the compensable injury properly, the employer-carrier is responsible for treatment of both conditions. Thus, where obesity was hindering treatment for a compensable knee injury, the employer-carrier was held responsible for providing the claimant with mandibular immobilization to reduce the obesity.[69] Where an air conditioning unit was provided to an employee who suffered a heart attack, pursuant to a medical recommendation, the payment of expenses incurred, including electric bills and repairs, was held approriate.[70] Travel to a drug store for prescriptions, however, is not reimbursable travel.[71]

V. Specific Injuries

Wooldridge v. City of Miami[72] involved a fireman who claimed to have suffered a heart attack arising out of and in the course of

66. Swift & Co. v. Kessler, I.R.C. Order 2-3102 (Fla. Indus. Rel. Comm'n Jan. 31, 1977), *cert. denied*, 354 So. 2d 982 (Fla. 1977).

67. *Id.*

68. *See* Sanderlin & Assoc. v. Crews, I.R.C. Order 2-3214 (Fla. Indus. Rel. Comm'n Aug. 10, 1977). In addition, the bill should be submitted by whomever is performing those services. Southern Steel Erectors v. Pate, I.R.C. Order 2-3026 (Fla. Indus. Rel. Comm'n Sept. 1, 1976)(S).

69. Washburn v. Royal Castle Sys., Inc., I.R.C. Order 2-3104 (Fla. Indus. Rel. Comm'n Jan. 31, 1977)(S).

70. Electric Constr. Co. v. Capps, I.R.C. Order 2-3205 (Fla. Indus. Rel. Comm'n July 25, 1977)(S).

71. *Id.*

72. I.R.C. Order 2-3007 (Fla. Indus. Rel. Comm'n July 28, 1976), *cert. denied*, 351 So. 2d 405 (Fla. 1977).

his employment. The claim was based upon conflicting medical opinions as to causal origin and was denied by the trial judge. The case involved application of the workmen's compensation law, section 112.18 of the Florida Statutes, providing that heart disease sustained by a fireman "shall be presumed to have been accidental and to have been suffered in the line of duty unless the contrary be shown by competent evidence."[73] The trial judge found that the evidence presented by the employer was competent and sufficient to overcome this statutory povision. The Industrial Relations Commission reversed, stating that the presumption may not be overcome by a medical statement that the heart disease was not causally related to the employment.[74] It is unclear as to the quality, if any, of medical testimony which will be sufficient to overcome this statutory presumption applying to fire fighters.

In connection with claims for permanent total disability, where it is clear from the disabling nature of the injury that a search for work would be fruitless, the employee may not be so required to act.[75] However, where the disabling nature of the injuries does not clearly render the claimant permanently and totally disabled, the claimant must seek employment within his or her capability[76] and physical limitations.[77]

VI. Maximum Medical Improvement and Temporary Benefits

Under section 440.15 of the Florida Statutes, payment of temporary total disability compensation must now be reduced by the amount of unemployment compensation received during any similar week.[78] Prior to this statutory amendment, the law allowed for recovery of both unemployment compensation benefits and temporary disability benefits during the same period of time.[79]

The date of maximum medical improvement, which fixes the conclusion of temporary benefits and the commencement of permanent disability benefits, occurs when the healing period is over ac-

73. Fla. Stat. § 112.18(1) (1977).

74. Wooldridge v. City of Miami, I.R.C. Order 2-3007 at 4-5.

75. *See* General Elec. Co. v. Hughes, I.R.C. Order 2-3216 (Fla. Indus. Rel. Comm'n Aug. 16, 1977).

76. *Id.*; Florida Cuttings, Inc. v. Garcia, I.R.C. Order 2-3170 (Fla. Indus. Rel. Comm'n May 31, 1977), *cert. denied*, 353 So. 2d 675 (Fla. 1977); Harris v. Anderson, I.R.C. Order 2-3068 (Fla. Indus. Rel. Comm'n Nov. 18, 1976), *cert. denied*, 345 So. 2d 420 (Fla. 1977).

77. Gonzalez v. Gonzalez, I.R.C. Order 2-3063 (Fla. Indus. Rel. Comm'n Nov. 12, 1976)(S).

78. Fla. Stat. § 440.15 (1977).

79. C.A. Atherton Oil Co. v. Bailey, I.R.C. Order 2-2986 (Fla. Indus. Rel. Comm'n June 25, 1976)(S).

cording to reasonable medical probability. In fixing the date of maximum medical improvement, the trial judge must make the best determination based upon the evidence presented. When the only evidence presented is that the employee's maximum medical improvement occurred by the time of a particular medical examination, the trial judge may fix the date as the time of that examination, although the improvement may well have occurred somewhat earlier.[80] Where an employee fails to cooperate with medical recommendations and there would be no further improvement without that cooperation, the trial judge may determine that the point of maximum medical improvement has been reached.[81]

Where an employee has multiple injuries and has reached maximum medical improvement regarding one injury, it is error to commence payment of permanent benefits until overall maximum medical improvement has been achieved.[82] However, where further temporary benefits are not due, it has been suggested that permanent benefits should commence when any of the multiple injuries has reached the point of maximum medical improvement.[83]

VII. PROCEDURE

Matters in this area can best be categorized as: (1) general procedural decisions; (2) findings of fact; and (3) rules of procedure. Practitioners must increasingly give careful attention to procedural aspects, both at the trial and appellate levels, in properly representing their clients.

A. *General Procedural Decisions*

It is error for the trial judge to determine issues other than those appropriately presented. Thus, if the parties have agreed to try the issue of compensability, it is error to make any determination beyond the particular benefits due.[84] This is equally true in connection with particular benefits to be determined. Where remedial treatment is not requested, it is error for the trial judge to deny entitle-

80. *See* Eden Roc Hotel v. Tamarit, I.R.C. Order 2-3111 (Fla. Indus. Rel. Comm'n Feb. 18, 1977).

81. Murphy v. Walsh, I.R.C. Order 2-3086 (Fla. Indus. Rel. Comm'n Jan. 4, 1977), *cert. denied*, 351 So. 2d 407 (Fla. 1977).

82. Thompson v. Arnold Cellophane Corp., I.R.C. Order 2-3029 (Fla. Indus. Rel. Comm'n Sept. 2, 1976)(S).

83. Arkin Constr. Co. v. Benninger, I.R.C. Order 2-2429 (Fla. Indus. Rel. Comm'n Sept. 25, 1973), *cert. denied*, 292 So. 2d 23 (Fla. 1977).

84. *See* Adams Packing Assoc. v. Reeves, I.R.C. Order 2-3139 (Fla. Indus. Rel. Comm'n Apr. 20, 1977), *cert. denied*, 353 So. 2d 673 (Fla. 1977).

ment to it.[85] Also, it is error to make a determination as to permanent disability benefits where no claim is pending for the benefits.[86]

The above decisions should be considered in conjunction with recent determinations that a claimant may withdraw his claim from the adjudicatory process until he has "rested" his case.[87] Thus, if things are going badly, the claimant may, until he has rested, withdraw the claim and come back another day. This rule, however, applies only to the point of resting the case in chief.[88]

Where an incomplete record is presented to the Industrial Relations Commission, the order should be affirmed on the grounds the record is not sufficiently complete to determine error. In *Southern Mill Creek Products v. Bellamy,*[89] the majority took this view and affirmed the order below, whereas the dissent took the view that the order should have been reversed since the record was too incomplete to show the order was supported by competent substantial evidence.

The Industrial Relations Commission has held that in the exercise of its discretion it will not review interlocutory orders.[90] However, the recent case of *Prestressed Systems, Inc. v. Moser*[91] would seem to compel counsel to seek review of a particular order at the time it is entered absent a previous pronouncement dealing with the specific issue. In this case, the Industrial Relations Commission categorized an order entered requiring the payment of cost of a transcript of record as "basically an interlocutory one."[92] But it was held that this was the type of interlocutory order which should have been immediately reviewed rather than being reviewed pursuant to a final order.

B. *Findings of Fact*

The necessary findings of fact in support of any determination must be supported by competent substantial evidence. The extent

85. Thompson v. Citrus Central, Inc., I.R.C. Order 2-3124 (Fla. Indus. Rel. Comm'n Mar. 10, 1977)(S).

86. Long v. Howard Johnson's Buena Vista, I.R.C. Order 2-3108 (Fla. Indus. Rel. Comm'n Feb. 14, 1977)(S).

87. Orlando v. Exxon Co., I.R.C. Order 2-3040 (Fla. Indus. Rel. Comm'n Sept. 22, 1976)(S).

88. *See* Hamman v. Churchman Tower Serv., I.R.C. Order 2-3083 (Fla. Indus. Rel. Comm'n Dec. 29, 1976)(S).

89. I.R.C. Order 2-3210 (Fla. Indus. Rel. Comm'n Aug. 2, 1977)(S).

90. City of Tampa v. Carnegie, I.R.C. Order 2-3243 (Fla. Indus. Rel. Comm'n Oct. 3, 1977)(S); Pepsi-Cola Co. v. Horn, I.R.C. Order 2-3130 (Fla. Indus. Rel. Comm'n Apr. 7, 1977), *cert. denied,* 352 So. 2d 173 (Fla. 1977); Clark v. City of Dunedin, I.R.C. Order 2-3128 (Fla. Indus. Rel. Comm'n Apr. 4, 1977)(S).

91. I.R.C. Order 2-3154 (Fla. Indus. Rel. Comm'n May 16, 1977).

92. *Id.* at 2.

of required findings of fact has a direct correlation with the discretion of the trier of facts in determining a cause. A previous statutory amendment[93] and decisions interpreting it,[94] greatly limiting the required findings of fact, seem to have been significantly diluted.

Where an award is based upon the claimant's demonstration of the nature of his injury, it is incumbent upon the trial judge to state what he has observed.[95] As a general rule, where the award is in excess of any anatomical rating, whether it be a scheduled injury or loss of earning capacity, the trial judge must carefully express his reasons for supporting the ultimate result.[96] An order dismissing a cause must contain sufficient findings of fact to apprise the parties of the basis for the ruling.[97] Where findings of fact regarding acceptance of the opinions of one physician over that of another were deemed inadequate, the Industrial Relations Commission remanded the cause for appropriate findings and redetermination.[98] Necessary findings regarding attorney's fees may now be greater than in any other area.[99]

The Supreme Court of Florida has approved the remand of cases by the Industrial Relations Commission for further clarification of the findings, notwithstanding the existence of competent substantial evidence supporting other aspects of the case.[100] In *Buro v. Dino's Southland Meats,*[101] the Supreme Court of Florida reversed a remand and stated: "that decision [*Schaefer v. Saint Anthony's Hospital*] cannot constitute authority for indiscriminate remands to the Judge of Industrial Claims where the record contains competent substantial evidence."[102]

These recent decisions reflect enhanced requirements as to findings of fact. The final standard is still unclear and it is suggested that the extent of required findings will remain somewhat fluid.

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93. FLA. STAT. § 440.25(3)(c) (1977) (originally enacted as 1967 Fla. Laws, ch. 67-374).

94. *See* Pierce v. Piper Aircraft Corp., 279 So. 2d 281 (Fla. 1973); Brown v. Griffin, 229 So. 2d 225 (Fla. 1969).

95. *See* Rohan Assocs., Inc. v. Williams, I.R.C. Order 2-2828 (Fla. Indus. Rel. Comm'n Aug. 12, 1975)(S).

96. *See* Moses v. Lin Drake Farm, I.R.C. Order 2-3193 (Fla. Indus. Rel. Comm'n July 11, 1977)(S); Willingston Welding Fabricating Co. v. Brooks, I.R.C. Order 2-3167 (Fla. Indus. Rel. Comm'n May 25, 1977)(S); Helene Transp. v. Levy, I.R.C. Order 2-2848 (Fla. Indus. Rel. Comm'n Sept. 30, 1975)(S); Alhambra Dev. v. Gonzalez, I.R.C. Order 2-2818 (Fla. Indus. Rel. Comm'n July 21, 1975), *cert. denied,* 330 So. 2d 17 (Fla. 1977).

97. *See* Ray v. Corbett Motor Supply, Inc., I.R.C. Order 2-3028 (Fla. Indus. Rel. Comm'n Sept. 2, 1976)(S).

98. Shores Enterprises, Inc. v. Branny, I.R.C. Order 2-3256 (Fla. Indus. Rel. Comm'n Oct. 20, 1977)(S).

99. *See* text accompanying notes 21 & 22 *supra.*

100. Schaefer v. Saint Anthony's Hosp., 327 So. 2d 221 (Fla. 1976).

101. 354 So. 2d 874 (Fla. 1978).

102. *Id.* at 877.

C. *Rules of Procedure*

New workmen's compensation rules of procedure were approved by the Supreme Court of Florida, effective date July 1, 1977.[103] The significant changes are as follows:

Rule 7. Application for Hearing

In applying for a hearing, the issues sought to be determined shall be stated concisely in separate numbered paragraphs. The first request for hearing shall be filed with the Bureau in Tallahassee, and subsequent requests shall be filed with the judge of industrial claims. A copy of any application is required to be served upon the opposing counsel or party. Failure to serve a copy of the application as required shall be grounds for a continuance or cancellation of the hearing.

Rule 9. Discovery

Depositions may be taken prior to the institution of a claim, but only if the claimant is represented by an attorney. After the filing of a claim, a deposition may be taken in the same manner and for the same purposes as provided in the Florida Rules of Civil Procedure.

Rule 10. Pretrial Procedure

This is an entirely new rule and adds a new dimension to workmen's compensation proceedings. The trial judge may schedule a pretrial conference, or upon motion of any party order a pretrial conference. Fifteen days' notice is required. An order is required to be entered in connection with the pretrial conference. The order is to be served upon the parties and "shall control the subsequent course of the action unless the Judge modifies it to prevent injustice."[104]

Rule 11. Prosecution of Claims Before Judge of Industrial Claims

This also is an entirely new rule making significant changes. *All* parties must diligently prosecute and defend the claim. The previous rule required only the claimant to diligently prosecute the claim. Now a hearing may be cancelled by a party and the cause continued only "for good cause which has not resulted from a lack of diligence in the prosecution or defense of the claim."[105]

The rule also provides for dismissal of a pending claim after a hearing thereon where "no action has been taken by request for

103. *In re* Workmen's Compensation Rules of Procedure, 343 So. 2d 1273 (Fla. 1977) (per curiam).

104. *Id.* at 1279.

105. *Id.*

hearing, filing of pleadings, order of Judge, payment of compensation, provision of medical care, or otherwise for a period of two years after filing."[106] Where there has been no prosecution, upon the filing of a motion to dismiss, the claim will be dismissed, "unless a party shows good cause why the claim or petition should remain pending."[107]

Rule 16. Record on Appeal

The primary change under Rule 16 provides for an abbreviated record. This allows the appellant to file designations regarding the particular portions of the proceedings to be included in the record. Within ten days after service, the opposing party may file cross-designations. The obvious purpose of the rule is to allow the parties to reduce the size and cost of the record where only a few issues are raised on appeal, requiring only limited portions of the record.

The time for payment of costs or the filing of a petition to be relieved of costs has been reduced from twenty days to fifteen days after service of notificaton of costs. However, since service is invariably accomplished by mail (which pursuant to Rule 3(b) allows an additional five days after the date of mailing), the time allowed is essentially the same as under the previous rule. The petition to be relieved of costs must be filed with the judge along with an informational copy for the Bureau. It must be verified and the appellant or his attorney must include as a part of the verified petition "an affidavit or affirmation that, in his opinion, the Application for Review was filed in good faith and that the assignment of error contained therein constitutes a probable basis for the Commission to find reversible error."[108] Failure to attach the required certification would result in a defective petition which would not suffice to toll the time for payment of the costs and could result in dismissal of the appeal.[109] Upon denial of the petition, the fifteen day period for depositing the costs commences to run.[110]

An insolvency petition may be filed with the judge of industrial claims with a copy served upon the Bureau in Tallahassee. A copy must be served upon the other parties. A hearing shall be conducted with fifteen days' notice to the parties except that "[t]he judge may enter an order without such hearing if no objection is filed by

106. *Id.*

107. *Id.*

108. FLA. STAT. § 440.25(4)(c)(2) (1977).

109. *See* South Coast Water Constr. v. Allen, I.R.C. Order 2-3204 (Fla. Indus. Rel. Comm'n July 22, 1977), *cert. denied*, 354 So. 2d 978 (Fla. 1977) (holding certification as to reasonable grounds for appeal must be attached to the petition for it to be a valid pleading).

110. FLA. STAT. § 440.25(4)(c) (1977).

the Division or an interested party within twelve days from the date the verified petition is filed."[111]

Rule 18. Jurisdiction; Proposed Settlement; Motion for Remand

Upon appeal being filed, the judge shall have no further jurisdiction with respect to the cause, except regarding matters pertaining to the record on appeal. "A party may, however, file a motion with the Commission or Supreme Court requesting remand of the cause to the Judge for further proceedings."[112] Thus, the parties may proceed with determinations at the trial level while particular issues are pending at the appellate level.[113] Determinations by the Industrial Relations Commission and supreme court ordinarily require more than one year. During that time, one party may or the other may require appropriate relief at the trial level.[114]

VIII. CONCLUSION

Legislatively, the 1977 workmen's compensation law has effected few changes in the substantive rights of employee-claimants. Probably, the most significant change involves the codification of guidelines pertaining to the amount of attorney's fees to be awarded in relation to the benefits obtained. Finally, it is apparent from recent decisions that there has been a narrowing in the range of compensable consequences and stricter proof and findings requirements in connection with the award of particular benefits.

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11. *In re* Workmen's Compensation Rules of Procedure, 343 So. 2d at 1282.

112. *Id.*

113. McDonald's Drive-In v. Shrewsberry, I.R.C. Order 2-3013 (Fla. Indus. Rel. Comm'n Aug. 3, 1976)(S).

114. Hatch v. City Cab Co., I.R.C. Order 2-3300 (Fla. Indus. Rel. Comm'n Dec. 21, 1977)(S).